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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-583

STANLEY FORSACK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
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PRELIMINARY STATEMENT

PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, STANLEY FORSACK, respectfully prays that a writ of certiorari issue to review the order of the U.S. Court of Appeals for the Second Circuit entered in the proceeding on September 21, 1977 which order affirmed the judgment of conviction of the U.S. District Court for the Eastern District of New York (Hon. Thomas Platt) made on May 27, 1977 after a jury trial.

OPINION BELOW

No opinion was rendered by the U.S. Court of Appeals in affirming the Judgment of Conviction.

JURISDICTION

The order of the U.S. Court of Appeals for the Second Circuit was entered on September 21, 1977. This petition for certiorari is filed within 30 days of that date. The Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioner's rights to the assistance of counsel at every stage of the criminal proceeding herein, rights guaranteed under the Sixth Amendment and Fourteenth Amendment of the United States Constitution were violated by a post arraignment, non custodial interrogation conducted by an official of the Alcohol, Tobacco and Firearms Division of the United States Treasury Department.

2. Whether petitioner's constitutionally guaranteed rights to a speedy arraignment were violated by the post arrest actions of the Alcohol, Tobacco and Firearms agents, which led to the eliciting of oral admissions from petitioner, utilized against him at trial.

STATUTES INVOLVED

United States Constitution, Amendment 6 and 14.

STATEMENT OF THE CASE

On October 28, 1977 petitioner was arrested by agents of the Alcohol, Tobacco and Firearms Division of the United States Treasury Department, on a charge of having violated Title 18, Section 922 (a) (1) of the U.S. Code, a felony, bearing a maximum sentence on conviction of five years imprisonment and a $5000.00 fine. The affidavit upon which the arrest warrant was issued, alleged that

petitioner unlawfully engaged in the business of dealing in firearms without a license by selling one 45 caliber pistol to an Alcohol, Tobacco and Firearms agent, who was acting in an undercover capacity. After petitioner was in custody, he was handcuffed and placed in the rear seat of a United States Government vehicle. Seated alongside him, likewise in handcuff, was the person to whom the sale allegedly had been made. The individual was not identified as an Alcohol, Tobacco and Firearms agent and the impression was created that such individual was likewise under arrest for dealing in firearms. Under the seat of the government vehicle was a tape recorder which petitioner accidentally stepped on as he entered the vehicle. Petitioner was brought to local police headquarters in Nassau County, New York for processing and thereafter, about four hours later, and prior to arraignment brought before an assistant United States Attorney for the Eastern District of New York. At a suppression hearing, testimony developed that the assistant United States Attorney thereupon informed petitioner for the first time that he was charged with the sale of a gun to an undercover officer and the assistant United States Attorney asked petitioner whether he wished to "cooperate". He was told that any "cooperation" would be made known at a later time to a sentencing Court. The activities of the Alcohol, Tobacco and Firearms agents was "part of their showmanship" as testified to at a subsequent suppression hearing. At the suppressing hearing, the Alcohol, Tobacco and Firearms case agent, PIERCE ROGERS, testified that after petitioner was informed by the United States Attorney that he was being charged with the sale of a weapon to an undercover officer, he experienced a change of heart and decided to "cooperate". Petitioner was thereafter arraigned. The Magistrate appointed an attorney from the Legal Aid Society to represent petitioner, who was released in his own recognizance. Apparently by prearrangement,

after arraignment, the Alcohol, Tobacco and Firearms agent offered to and did drive petitioner back to the place of arrest in Floral Park, New York, so that petitioner could pick up his own vehicle. During the car ride and without the presence of counsel the agent again presented the matter of "cooperation" and an appointment was made for the following day at the Alcohol, Tobacco and Firearms headquarters in Mineola, New York. Apparently, petitioner commenced his "cooperation" in the vehicle ride back to Floral Park as Agent ROGERS testified at the suppression hearing that petitioner had supplied him with a business card of one VICTOR ACCEDENO, as an alleged supplier of illegal weapons.

The following day, petitioner appeared at the Alcohol, Tobacco and Firearms headquarters. It is conceded that no Mineola warnings were given prior to the interview, nor was petitioner apprised of his rights to have counsel present. The only reference to counsel had come about during the car ride the previous day, when, as Agent ROGERS testified, he told petitioner that he (Rogers) "knew" MR. KELLY from past Court cases, that Mr. Kelly was a "good" man and that petitioner should listen to his advice. At the post arrest, non custodial interrogation petitioner was advised that he was going to be prosecuted for the sale of four (4) additional gun to undercover agents, not only the one sale of one gun with which he had been charged. The agent elicited from petitioner information as to the sources of the handguns sold. The agent testified that he only wanted the information so that he might prosecute other persons who might have been engaged in unlawful gun dealing activities. However, the information elicited from petitioner formed the basis or oral admissions, which were utilized against petitioner at trial. The oral admissions were introduced against petitioner as evidence of predisposition to convict the offense charged in refutation of petitioner's entrapment defense. They were thus relevant

and highly prejudicial to petitioner's defense.

On a suppression hearing held prior to trial, the court stated that since petitioner was not in custody no Miranda warnings had to be given. Also, the Court held that petitioner's statements were voluntarily made and thus admissible. The Court skirted the issue with regard to petitioner's right to counsel. The Second Circuit held that the issue had not been sufficiantly raised at the trial Court level and affirmed. The Second Circuit did, however, admonish the U.S. Attorney concerning the taking of post arrest oral statements by law enforcement officials.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTED WITH DECISIONS OF THIS COURT IN BROWN V. WILLIAMS U.S. , 97 SUP CT. REP. 1232 (DECIDED MARCH 23, 1977) AND MASSIAH V. U.S. 377 U.S. 201, 84 SUP CT. REP. 1199 12 L. ED. 2 246.

As this Court, by Mr. Justice Stewart has clearly and unequivocally stated in Brewer v. Williams, supra at P. 1240, "Rather, the clear rule of Massiah is that once adversary proceedings have commenced against an individual, he has the right to legal representation when the government interrogates him." It is the burden of the government to clearly establish that petitioner knowingly and voluntarily relinquished the right to counsel. Johnson v. Herbert, 304 U.S. 458, 464. This is so, because there is a presumption against waiver of the right to legal counsel. Glasser v. U.S. 315 U.S. 60, Schreckboth v. Bustamonte 412 U.S. 218, 93 Sup. Ct. 2041.

It is respectfully urged that the facts and circumstances herein do not show such a waiver by petitioner. On the contrary, the facts show that by the use of psychological manipulation the U.S. Government agents

succeeded in perverting the rights of petitioner.

In the automobile ride, after arraignment, Agent Rogers persisted in discussing "cooperation"; he made the appointment for the next day at Alcohol, Tobacco and Firearms headquarters. Rogers testified that the "cooperation" may have commenced in the car ride back to Floral Park in that petitioner was questioned and furnished the agents with the business card of one Victor Accedino, the source of purchase of one of the weapons. The agent knew that petitioner did not have the opportunity to consult an attorney during the car ride. An appointment was made for the next day at Alcohol, Tobacco Firearms headquarters. No reference was made to petitioner's court appointed attorney other than the remark by the agent that "Mr. Kelly is a good man, you should listen to him."

When petitioner appeared at Alcohol, Tobacco Firearms headquarters the following day, no warnings were given to him and he concededly was not asked whether he wished counsel to assist him or whether he wished to waive his right to counsel.

The Trial Court in denying suppression held that no Miranda warnings were required since this was a non custodial interrogation and further held that the petitioner's acceptance of the car ride was of his own volition as was his appearance at Alcohol, Tobacco Firearms headquarters the next day. In effect the Court held that petitioner had waived his right to counsel by his voluntary acts. However, a valid waiver cannot be presumed merely because of a failure to object as this Court stated in Carnley v. Cochran, 369 U.S. 506, 516 (1962).

> "Presuming waiver from a silent record is impermissible. The record must show or there must be an allegation and evidence must show that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything else is not waiver.

THIS COURT IS REQUESTED TO SET DOWN DEFINITIVE GUIDELINES AS TO THE RIGHTS OF AN ACCUSED TO COUNSEL COVERING PAST ARREST INTERROGATIONS.

While the means employed in the instant case to obtain oral admissions from petitioner, utilized against him at trial, were not surreptitions, as in Messiah, certainly they were heavily weighted psychologically. The admitted actions of the Alcohol, Tobacco Firearms agents in bringing petitioner before an assistant U.S. Attorney prior to arraignment were both unfair and unethical. They were calculated to put petitioner in the proper frame of mind for "cooperation". Petitioner should have been immediately brought before a U.S. Magistrate for arraignment. Certainly the Magistrate could have explained to petitioner the charges against him and his rights as well as the assistant U.S. Attorney. The Constitutional safeguards set forth in Miranda v. Arizona, 384 U.S. 436, 86 Sup. Ct. 1802 are meaningless if law enforcement authorities can evade them with impunity. Simply secure the release of an accused either on bail or his own recognizance pending trial, and then invite him into the office "to talk things over". If the judgment of conviction herein were to stand then no accused need to be given Miranda warnings at such interrogation nor could he be advised of his right to the aid and assistance of counsel at every stage of the proceeding. We think, rather the rule should be that at any post arrest, non custodial interrogation, as here, the accused must be advised of his right to have counsel present. Our system demands that an accused be represented by counsel at every stage of the court proceeding. Can we expect anything less at a post arrest, non custodial, extra judicial proceeding.

CONCLUSION

FOR ALL THE ABOVE REASONS, A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE ORDER OF THE SECOND CIRCUIT.

Respectfully submitted

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212-Ev 7-8200

Dated: October 17, 1977

ORDER OF AFFIRMANCE

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Court House in the City of New York on the twenty first day of September, One Thousand Nine Hundred and Seventy-Seven.

Present:

HON. J. JOSEPH SMITH.

HON. ROBERT P. ANDERSON

HON. MURRAY I. GURFEIN

Circuit Judges.

UNITED STATES OF AMERICA.
Plaintiff-Appellant.

v.

STANLEY FORSACK.
Defendant-Appellant.

77-1293

Appeal from the United States District Court for the Eastern District of New York.

This case came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgement of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk
By Arthur Heller
Deputy Clerk

Supreme Court, U. S.
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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-583

STANLEY FORSACK, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was deprived of the effective assistance of counsel when he voluntarily made certain uncounseled statements after his arrest.

1. Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of engaging in the business of dealing in firearms without a license, in violation of 18 U.S.C. 922(a)(1). Petitioner was sentenced to three years' imprisonment and fined $5,000. The court of appeals affirmed without opinion (Pet. App. 1a-2a).

The evidence at trial showed that petitioner, who was not a federally licensed firearms dealer (Tr. 212), sold guns to undercover Alcohol, Tobacco and Firearms (ATF) agents on three occasions in September and October of 1976 (Tr. 122, 127, 135).

The evidence at a pre-trial suppression hearing showed that when petitioner was arrested on October 27, 1976, he was taken to a police station in Nassau County for fingerprinting and processing and was then brought before a federal magistrate in Brooklyn less than five hours after his arrest (Tr. 4-7). Petitioner was given *Miranda* warnings twice before his initial appearance. Although the agents, on the way to Brooklyn, asked petitioner if he would cooperate by giving information about his source of firearms, petitioner stated only that "he wanted to think about it" (Tr. 7) and made no incriminating statements.

At his initial appearance, the magistrate assigned Legal Aid Society counsel to represent petitioner (Tr. 9). After the hearing petitioner was released on his own recognizance (Tr. 8-9, 58). An ATF agent then asked petitioner if he could give him a ride home, and, as petitioner testified, "I thought he was kind enough to do it and I accepted the offer" (Tr. 59). During the ride home, the agent again asked petitioner if he would cooperate, and petitioner agreed to meet at the agent's office the following day (Tr. 10-11). At that meeting petitioner made statements, which he later moved to suppress, concerning his acquisitions of firearms (Tr. 12-14). The district court denied petitioner's suppression motion after a hearing, holding that the statements were given voluntarily in a non-custodial setting (Tr. 102-104).

2. Petitioner's claim in this Court, insofar as we can understand it, appears to focus exclusively upon an alleged violation of his Sixth Amendment right to the assistance of counsel because his attorney was not present at the time he made the statements in question. He does not now challenge the voluntariness of his statements, but only the legal sufficiency of his waiver of counsel. We

note at the outset that petitioner's suppression motion did not rely on any claim of deprivation of assistance of counsel. This omission constitutes a waiver of the claim under Fed. R. Crim. P. 12(f), since a suppression motion preserves only those grounds expressly relied upon in support thereof. See, *e.g.*, *United States* v. *Braunig*, 553 F. 2d 777, 780 (C.A. 2); *United States* v. *Schwartz*, 535 F. 2d 160, 163 (C.A. 2); *United States* v. *Barber*, 495 F. 2d 327, 329 (C.A. 9); cf. *Wainwright* v. *Sykes*, No. 75-1578, decided June 23, 1977.

Petitioner's contention is, in any event, without merit. The district court concluded, and the record clearly shows, that petitioner did make a knowing and voluntary waiver of his right to counsel. As the district court found, petitioner freely appeared at the ATF office, having had an opportunity overnight to reflect upon his alternatives, and he "proferred his services" (Tr. 103). Accordingly, petitioner's reliance on *Brewer* v. *Williams*, 430 U.S. 387, is misplaced. In *Brewer*, the incriminating statements were induced by police custodial interrogation in the face of the defendant's refusal to waive his right to counsel (*id.* at 399, 405). In the instant case, petitioner made no potentially incriminating statements until after he voluntarily went to the ATF office. Cf. *Beckwith* v. *United States*, 425 U.S. 341.[1]

Where, as here, no claim of coercion has been made, and the record shows that petitioner received *Miranda* warnings at least three times, spoke with counsel at his appearance before the magistrate, and voluntarily went to

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[1]In fact, the statements used at trial, detailing how petitioner acquired the guns he sold the agents, were not damaging to petitioner's defense. During his testimony, petitioner himself told of selling the weapons and testified about their sources as part of his entrapment claim (Tr. 311, 313-314, 321-322, 336, 355-357).

the agent one day later to cooperate, the government has met its burden of showing that petitioner knowingly and voluntarily waived the right to have counsel present. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218; *Brewer* v. *Williams*, *supra*, 430 U.S. at 404-406; *United States* v. *Garcia*, 377 F. 2d 321, 324 (C.A. 2), certiorari denied, 389 U.S. 991.[2]

3. Petitioner also presents as a question (Pet. 2), although he does not further argue it, the claim that his statements to the agents were the product of a delay in presenting him to the magistrate. Since, however, the statements in question were made the day following his initial appearance before the magistrate, any delay in presenting him is wholly irrelevant. and this claim is frivolous. See *Johnson* v. *Louisiana*, 406 U.S. 356, 365.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JANUARY 1978.

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[2] *Massiah* v. *United States*, 377 U.S. 201, relied on by petitioner (Pet. 5), is inapposite. There the Court held that incriminating statements surreptitiously obtained (by hidden radio transmitter) after the defendant's indictment violated the defendant's right to counsel. Those circumstances obviously precluded a finding that the defendant made the statements after a knowing waiver of his right to counsel. Here, in contrast, there was nothing surreptitious about the circumstances in which the statements were made.

DOJ-1978-01